NO. 87-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MELISSA DETSEL, et al.,
Petitioner,
v.
BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR ADVOCACY, INC., S.K.I.P. OF NEW YORK AND S.K.I.P. OF TEXAS IN SUPPORT OF PETITIONER MELISSA DETSEL

DIANA G. SHISK
Counsel of Record
ADVOCACY, INCORPORATED
7700 Chevy Chase Drive
Suite 300
Austin, Texas 78752
(512) 454-4816

Counsel for Amici Curiae

On the Brief
REED MARTIN

November 12, 1987

NO. 87-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MELISSA DETSEL, et al.,
Petitioner,

v.

BOARD OF EDUCATION OF THE AUBURN
ENLARGED CITY SCHOOL DISTRICT, et al.,
Respondents

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE

Advocacy, Incorporated, S.K.I.P. of New York and S.K.I.P. of Texas, as amici curiae in the accompanying proposed brief, hereby move the Court, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, for leave to file the proposed brief amici curiae in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The ground for this motion is that Advocacy, Inc., S.K.I.P. of New York and

S.K.I.P. of Texas have a direct and immediate concern regarding the denial to students with handicaps of school health services in the least restrictive environment as required by federal statutes and regulations. Amici work with and advocate for children like Petitioner and wish to file the attached proposed brief.

Advocacy, Inc., has obtained written consent from the Petitioner, Melissa Detsel, which has been filed with the Clerk of this Court. Advocacy, Inc., has also requested written consent from Respondents, but consent was refused.

Because of the serious implications of this case for school-aged children with health needs, and because of the apparent conflict between the decision in this case and the recent decision by this Court in **Irving Independent School**

District v. Tatro, 468 U.S. 883 (1984), Advocacy, Inc., S.K.I.P. of New York and S.K.I.P. of Texas, as amici curiae, submit that the points raised in the accompanying proposed brief would be helpful to the Court's consideration of the Petition for Writ of Certiorari.

For the foregoing reasons, Advocacy, Inc., S.K.I.P. of New York and S.K.I.P. of Texas respectfully request that this Motion for Leave to File Brief Amici Curiae be granted.

Respectfully submitted,

DIANA G. SHISK
Counsel of Record
ADVOCACY, INCORPORATED
7700 Chevy Chase Drive
Suite 300
Austin, Texas 78752
(512) 454-4816

Counsel for Amici Curiae

November 12, 1987

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont.)

NO. 87-615

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MELISSA DETSEL, et al.,
Petitioner,

v.

BOARD OF EDUCATION OF THE AUBURN
ENLARGED CITY SCHOOL DISTRICT, et al.,
Respondents

On petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

BRIEF AMICI CURIAE FOR ADVOCACY, INC., S.K.I.P. OF NEW YORK AND S.K.I.P. OF TEXAS IN SUPPORT OF PETITIONER MELISSA DETSEL

INTEREST OF AMICI CURIAE

Advocacy, Incorporated is one of the "Protection and Advocacy" systems created by Congress in Section 113 of Public Law 94-103, the Developmentally Disabled Assistance and Bill of Rights Act (1975), 42 U.S.C. Sec. 6042 as amended. For over ten years, Advocacy, Inc. has operated as Texas' agency to protect and advocate

the rights of persons with disabilities. In that capacity it has worked with thousands of citizens with disabilities and has represented a number of them in court, including residents of a group home for adults with mental retardation in **City of Cleburne, Texas v. Cleburne Living Center**, 473 U.S. ___, 105 S.Ct. 3249 (1985), and a child needing school health services, **Irving Independent School District v. Tatro**, 468 U.S. 883 (1984). Advocacy, Inc.'s victory in **Tatro**, and the benefits that have flowed to children needing school health services in order to attend school, are threatened by the instant case for which a Writ is being sought. Advocacy, Inc. currently represents several hundred students barred from admission to public school because the responsible school districts claim they should not have to

provide the school health services needed to enable the children to attend public school. Under the standard in **Tatro**, they will all be individually considered for services. Under the standard in the instant case, they would not leave their homes or institutions for even a portion of the day.

Amici curiae S.K.I.P. of New York and S.K.I.P. of Texas are state chapters of a nationwide organization, Special Kids need Involved People. The children whose parents are members of S.K.I.P. are very much like the Petitioner in the instant case. These children have benefitted from the clear standard enunciated in **Tatro** and are already seeing a loss of services because of the Second Circuit's opinion in this case.

Without clarification that **Tatro** is dispositive on the issue of the dividing

line between which school health services are includable under the applicable statute and which services are excludable as medical, amici curiae know that many children will be denied an opportunity for education enjoyed by their peers. For this reason, amici curiae respectfully ask the Court to grant Petitioner's Writ of Certiorari.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth by Petitioner.

SUMMARY OF THE ARGUMENT

Petitioners have set out concisely the compelling grounds on which they seek review of the judgment in this case. Amicus curiae support that petition on the grounds raised therein and respectfully emphasize three points.

First, in 1984 this Court decided the **Tatro** case unanimously on the issue of school health services under the Education of the Handicapped Act. For three years that clear standard has guided the provision of services to children such as Petitioner. In the instant case, however, the Second Circuit explicitly ignored this Court's decision in **Tatro** and created its own new standard which is in conflict with the Supreme Court ruling.

Second, Congress was clear in enacting the Education of the Handicapped Act, and its 1975 amendments, that children with disabilities were to be served in ways that afforded opportunities for interaction with nonhandicapped students. The Second Circuit ignored that requirement and created a standard which tolerates total

exclusion and total segregation from peers.

Third, damage is already being done by the Second Circuit's decision and school districts are backing away from enforcement of the Tatro standard.

ARGUMENT

I. The Supreme Court has already established in Tatro the test for providing school health services to students in special education but that test was ignored in this case.

For over three years, this Court's opinion in Irving Independent School District v. Tatro, 468 U.S. 883 (1984), has provided clear guidance on the provision of school health services by school personnel during school hours to a student with disabilities.

When Congress enacted the Education of the Handicapped Act, as amended by the Education for All Handicapped Children

Act of 1975, 20 U.S.C. Sec. 1400 et seq., (hereinafter "EHA"), it attempted to remove the barriers which caused schools to exclude certain students with handicaps. Amber Tatro was a student who would be excluded from school if it were not for the passage of the EHA. Amber needed the school health service of catheterization to enable her to void her bladder. The school refused to allow its personnel to perform that service, and Amber was excluded from public school.

In **Tatro**, supra, this Court established the standard for resolving such a conflict. First, is the child handicapped within the meaning of the EHA? Second, is the service a supportive service contemplated by the EHA? Third, does the service have to be performed during school hours? Fourth, without the service would the child be excluded from

school? 468 U.S. at 890. Fifth, is the particular service excluded as a medical service because it could not be performed by a school nurse or other qualified person other than a physician? 468 U.S. 891-895.

In regard to the latter point, this Court decided that the medical services exclusion "was designed to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." 468 U.S. at 892. This Court then approved the regulations promulgated by the Department of Education (468 U.S. at 891-892) and stated clearly that the medical services exclusion is limited "to the services of a physician or hospital ...." 468 U.S. at 893.

Thus this Court crafted a clear and workable standard in **Tatro** that services

that are needed in order to enable a handicapped child to be in school during the day, and which can be provided by a nurse or other qualified person short of a physician, are required under the EHA.

That standard was totally ignored by the Second Circuit in deciding the instant case. **Tatro** is not even mentioned in that decision. **Detsel v. Board of Education of the Auburn Enlarged City School District**, 820 F.2d 587 (2nd. Cir. 1987).

In contrast to **Tatro**, the Second Circuit created a very subjective three prong test. First, they ask is the service complicated? Second, they ask is the service needed constantly rather than intermittently? Third, they ask must the person providing the service care for other children? 820 F.2d at 588. An affirmative answer to any of the three

presumably excludes the service. The implication is clear that under the EHA, as interpreted by the Second Circuit, a school need only provide casual and simple related services but not anything that requires continuous attention.

The Second Circuit adopted the reasoning of the lower court, 637 F.Supp. 1022 (N.D. N.Y. 1986), which characterized this Court's decision in **Tatro** by saying: "The Supreme Court held only that school nursing services of a simple nature are not excludable as therapeutic medical services." 637 F.Supp. at 1027. There is thus a large gap between the **Detsel** standard and the **Tatro** standard. In **Tatro**, a service is included in the EHA if it meets the requirements detailed supra including requiring less than a physician. In **Detsel**, the service is not required if it

is not simple and if the person providing the service might also be required to care for others.

II. The Second Circuit's decision ignores the mandate for integration with the nonhandicapped.

The result of the Second Circuit's decision is the predictable exclusion from school of children with complicated school health needs. If a school decides the needed service is "complex" rather than "simple," they can refuse. Worse, if the school decides not to hire enough personnel, so that one school nurse is stretched very thinly across services to many children, the school can refuse to provide the service as requiring too much of the designated service provider's time and thus being too "extensive." 637 F.Supp. at 1026.

The EHA was enacted to cause schools to provide the services needed to enable

children to be served in school. **Detsel** takes us back pre-EHA to allow schools to refuse services knowing that the result is total exclusion and segregation to "in-home instruction."

As this Court found in its first examination of the EHA: "The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible." **Board of Education v. Rowley**, 458 U.S. 176, at 202 (emphasis supplied). It is quite "possible" to educate Petitioner with nonhandicapped children, but the school district does not want to provide the related services personnel staffing ratio needed to accomplish that goal. The Second Circuit, in reaching its decision, never considered the mandate for education with the nonhandicapped and the duty to explore "supplementary aids and

services" when needed to keep a child in the regular environment. 20 U.S.C. Sec. 1412(5). The District Court opinion, adopted by the Second Circuit, did not discuss this mandate either.

Two other Circuits have considered similar school health needs and the mandate of integration. The Ninth Circuit found: "The congressional preference for educating handicapped children in classrooms with their peers is made unmistakably clear in section 1412(5)(B) of the Act ...." **Department of Education v. Katherine D.**, 727 F.2d 809 (9th Cir. 1984) cert. denied, 472 U.S. 1117 (1985), at 817. (Katherine breathes through a trachestomy tube, has to be suctioned several times a day, and required emergency care to reinsert the tube if it became dislodged from her "floppy" windpipe.)

Similarly, the Third Circuit decided: "Given the advantages of placement in as normal an environment as possible, to deny a handicapped child access to a regular public school classroom without a compelling educational justification constitutes discrimination and a denial of statutory benefits." **Tokarcik v. Forest Hills School District**, 665 F.2d 443 (3rd Cir. 1981), cert. denied sub nom. **Scanlon v. Tokarcik**, 458 U.S. 1121 (1982), at 458. (Child paralyzed from waist down, requiring catheterization.)

The result of the refusal of the Second Circuit to recognize that services in the least restrictive environment must be considered is to relegate this class of children to service in the most restrictive environment -- in-home instruction. One court which reviewed such instruction found "... plaintiff's

education will be reduced to some type of homebound tutoring. Such a result can only serve to hinder plaintiff's social development and to perpetuate the vicious cycle in which she is caught." **Stuart v. Nappi**, 443 F.Supp. 1235 (D. Conn. 1978), at 1240. That court reviewed homebound instruction several years later and, referring to the irreparable injury to social development, found "this result is incompatible with both his right to be educated with nonhandicapped children to the maximum extent appropriate and the obligation of the school to provide a continuum of alternative placements to meet his special educational needs." **Blue v. New Haven Board of Education**, ____ F.Supp. ____ (D. Conn. 1981), reprinted in 3 Education of the Handicapped Law Reporter 552:401, at 407.

This exclusion would be particularly sad for Petitioner since the record shows that she interacted regularly with nonhandicapped children in school and that interaction was considered to be the cause of her development of speech, communication and social skills. The Second Circuit's "balancing the interests of the parties" test (820 F.2d at 588) would favor not bothering a busy nurse rather than developing the ability of a handicapped girl to interact in a world of her peers.

III. The Detsel decision has already begun to erode the Tatro standard.

Amici curiae have already observed an erosion of the protection won in Tatro. Members of amici curiae organizations have noted a new resistance among some school districts to provide even catheterization, let alone more complex

school health services. The recent case of **Bevin H. v. Wright**, 666 F.Supp. 71 (W.D. Pa. 1987) is a perfect example. In **Bevin H.**, the multiply handicapped child was being served in a public school program which all parties agreed was the appropriate, least restrictive environment. Nursing services everyone agreed were necessary for Bevin to attend school were paid for by parents' insurance. 666 F.Supp. at 72.

However, when Bevin's insurance carrier limited reimbursement to ten hours of nursing service per week and Bevin's parents asked the school to assume the cost, the school no longer thought the services appropriate. The District Court recognized that although this issue of related services had been dealt with in two Supreme Court cases and four Circuit Court cases, it found the

dispositive case to be **Detsel**. 666 F.Supp. at 74. The District Court in **Bevin H.** referred to this Court's decision in **Tatro** only twice in passing, both times citing **Tatro** in a string with several other cases. 666 F.Supp. at 74.

The **Bevin H.** standard denies any duty of a school to provide nursing services which are "varied, intensive and costly," 666 F.Supp. at 76, adding on to the **Detsel** standard which allows the prohibition of services which are complex, extensive or require continuous attention.

Thus, if **Detsel** is allowed to stand unreviewed by this Court, that decision and its progeny will allow schools to ignore **Tatro** when they feel they can apply their interpretation of terms such as "intensive," "extensive," "varied," "complex," "continuous," and/or "costly."

With that menu of excuses available, why would any school district feel bound to defer to this Court's decision in **Tatro**?

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

DIANA G. SHISK
Counsel of Record
ADVOCACY, INCORPORATED
7700 Chevy Chase Drive
Suite 300
Austin, Texas 78752
(512) 454-4816

Counsel for Amici Curiae

November 12, 1987